

1 A You know, again, I can't agree
2 with it. I'm not saying I disagree with it.
3 I'm sort of agnostic. I could frame it a
4 different way. You know, I could say that if
5 they acquire this package, it would be a
6 bootstrap to larger distribution. Many cable
7 networks have done that very thing, one of
8 which is Versus, right, with the NHL.

9 So, you know, it's a double-edged
10 sword, and so I think the person writing this
11 had a point of view and maybe, you know,
12 knowledge of a certain set of facts that he or
13 she was trying to communicate. I don't have
14 all of that, so I can only say I'm sort of
15 agnostic.

16 Q Let me see if I can hack some of
17 the things you said just now in your answer.
18 Did you say that Versus used hockey to
19 increase its distribution?

20 A Well, I don't know whether it
21 increased its distribution, but I think it
22 uses it as a way of maybe sustaining

1 distribution, perhaps it increased
2 distribution. But, you know, certainly it's
3 a way of trying to take the channel to the
4 next level. If that's not the best example,
5 you know, there's others.

6 And it's a way of creating brand
7 value, so NHL Network is created by NHL, and
8 now they have a new asset -- Yes Sports
9 Network. The Yankees go out and create a
10 sports network that turns out to be more
11 valuable than the team.

12 So, you know, distribution is not
13 -- history tells us here that distribution is
14 not necessarily a barrier to building an asset
15 value. And so I don't -- you know, I can't --
16 I don't know the context this person is
17 speaking in.

18 Q Okay. Fair enough. I want to --

19 JUDGE SIPPEL: Wait a minute, wait
20 a minute. Whoa, whoa, whoa. You say
21 distribution may not necessarily add value?

22 THE WITNESS: No. What I was

1 saying, Your Honor, is the distribution, a
2 lack of distribution, a shortfall in
3 distribution, versus a competitor. So if
4 you've got two entities, two networks, one has
5 100 customers and the other only has 50, all
6 right, so the implication that -- the
7 interpretation here is that it's going to be
8 harder for Tennis Channel to acquire this
9 programming, because they only have the 50
10 customers and someone else might have 100.
11 Okay?

12 And I'm saying that's not
13 necessarily true, that the 50-customer
14 network, in this case Tennis Channel, may have
15 a way of acquiring that programming,
16 nonetheless. Maybe they overpay. Maybe they
17 get in bed with, in partnership with, the
18 rights holder. There is a lot of ways of
19 doing this to use that programming to build
20 value for them.

21 And so what I was saying is you
22 take other sports rights that have been

1 licensed at times to a lesser distributed
2 channel with fewer subscribers, or no
3 subscribers, and they have used that to build
4 the value. And my examples were -- so NHL
5 Network licensed its hockey package to Versus.

6 Well, Versus had less customers
7 than ESPN did at the time. So if this was a
8 necessarily a black and white barrier, why
9 would they do that? Well, probably there's a
10 lot of reasons they did it, but one of them is
11 that maybe Versus paid more money and made
12 some commitments to partnering and
13 sponsorship, and so forth.

14 And you know what? It seems to
15 have worked out just great, because hockey has
16 never been more popular. Over the years, the
17 ratings have jumped, and now Versus found
18 itself in the position of demanding more money
19 for its rights. So, in a way, Versus created
20 a Frankenstein for itself, right?

21 Luckily, Versus went and renewed
22 that package. You know, they beat out -- I

1 don't even know all the players -- I think
2 Fox, ESPN, and so forth. So this is -- I have
3 seen this dynamic happen in the industry a
4 number of times, where the rights are -- from
5 a rights holder may go to somebody with fewer
6 subscribers, because that entity has a way of
7 making it work or, you know, attempting to
8 make it work.

9 And so that's a long-winded
10 explanation to my reticence to simply agree
11 with the statement here that this is a con,
12 you know, a negative for Tennis Channel as
13 presented on this piece of paper.

14 JUDGE SIPPEL: Now, okay. And,
15 again, this is page 9 of Exhibit --

16 MR. SCHMIDT: Page 10, Your Honor.

17 JUDGE SIPPEL: Page 10 of Exhibit
18 40. Before I lose my thought here, but you
19 used -- also used the Yankees as an example.
20 Now, is there a limited distribution of the
21 Yankee -- I mean, probably there is, because
22 anybody that wants to get it is going to have

1 to pay for it.

2 THE WITNESS: Correct.

3 JUDGE SIPPEL: I mean, pay extra
4 for it.

5 THE WITNESS: Correct.

6 JUDGE SIPPEL: Am I correct on
7 that? Okay. So what is the motivation there?
8 What is the -- you know, what was the -- yes,
9 what was the motivation to get that thing on,
10 if distribution was not -- really wasn't an
11 issue?

12 THE WITNESS: So here is what
13 happened. The Madison Square Garden Network,
14 Regional Sports Network, New York City area,
15 had the Yankee package. They were --

16 JUDGE SIPPEL: What year was that?
17 How long does that go back, do you know? I'm
18 sorry to keep --

19 THE WITNESS: I would say that
20 that was in the -- MSG had those rights
21 through the '90s.

22 JUDGE SIPPEL: All right. Okay.

1 I'm with you.

2 THE WITNESS: And then, the
3 Yankees --

4 JUDGE SIPPEL: Is this causing you
5 a problem?

6 MR. SCHMIDT: No, not at all, Your
7 Honor.

8 JUDGE SIPPEL: Okay.

9 MR. SCHMIDT: No.

10 THE WITNESS: So the Yankees,
11 then, at contract renewal time I guess it was
12 -- I don't really remember the particulars,
13 right? Rather than deciding to relicense to
14 Madison Square Garden Network, who had
15 hundreds of thousands, millions -- I would
16 think millions of customers, right? They
17 decided to form their own network that had
18 zero customers. None. No revenue, nothing,
19 a lot of expenses.

20 So you would say, "Wait a minute.
21 Why would they do that?" Well, they did it
22 because they decided -- they felt that they

1 could build an asset, they could build their
2 own channel. Right? They'll take some hits.

3 Let's say that Madison Square
4 Garden was paying them \$50 million a year in
5 rights fees, probably not a bad number. So
6 they might take a hit, they're not going to
7 get that \$50 million for a year or two years
8 or three, or whatever.

9 But in the long term they will
10 come out with an asset, which was called Yes
11 Network, right, that is more valuable. And so
12 that's what I -- why I referenced the Yankees.

13 JUDGE SIPPEL: But they get the
14 value of the asset. That's what I'm a little
15 bit confused on. They don't have the
16 distribution, but they have to get
17 distribution in order for it to become
18 profitable.

19 THE WITNESS: Absolutely. They
20 have to now go start knocking on the doors of
21 the cable and satellite companies and
22 convincing them. In their case -- these are

1 not dumb people -- they know it's arguably the
2 most valuable sports franchise in America,
3 and, you know, may be the most in demand,
4 certainly New York City area. And so they
5 know that they have the distributors in a
6 tough position.

7 JUDGE SIPPEL: Okay. Now,
8 applying that -- you have a parallel situation
9 on exactly, of course, with Comcast, because
10 Comcast has an ownership right -- I guess
11 ownership interest in the Philadelphia Flyers.

12 So, I mean, in terms of the hockey
13 connection, they would have a leg up, wouldn't
14 they, in terms of -- I mean, as long as they
15 could meet the financial end of it, of course,
16 but, I mean, they've got -- when the NHL
17 meets, they've got to vote on who is going to
18 get what, or they have a platform at least to
19 sell their product, if nothing else.

20 THE WITNESS: A platform in the
21 form of what?

22 JUDGE SIPPEL: Well, they have the

1 board meeting trying to convince the hockey
2 league that they should buy on to Versus.

3 THE WITNESS: Oh, okay. Okay. So
4 if I understand you, what you're asking me is
5 that the Flyers have the ability to speak to
6 the NHL about licensing NHL rights to Comcast,
7 to Versus.

8 JUDGE SIPPEL: Correct. I'm
9 sorry, Versus. Yes, correct.

10 THE WITNESS: I really -- I don't
11 know how that works. I don't know the
12 Philadelphia Flyers. I don't know how much of
13 it Comcast owns or controls. I don't know
14 what role the Philadelphia Flyers have in the
15 NHL Network, and --

16 JUDGE SIPPEL: You've got a lot of
17 dynamics.

18 THE WITNESS: Yes. And remember
19 now, the rights that Versus had on the NHL
20 package are national games, right? So we are
21 watching -- well, not necessarily watching the
22 Flyers. Every now and then it might be the

1 Flyers, but --

2 JUDGE SIPPEL: Oh, I understand
3 that.

4 THE WITNESS: Yes.

5 JUDGE SIPPEL: I'm just saying it
6 gives a platform to make the pitch.

7 THE WITNESS: Right, yes.

8 JUDGE SIPPEL: And owners kind of
9 just -- you know, they come up with one of
10 those supposedly.

11 THE WITNESS: I don't know. I
12 know these are big businesses, and, you know,
13 the -- the owners and the league I'm sure is
14 in it to maximize their profits at all times.
15 And so that's what they're going to do.

16 JUDGE SIPPEL: I got the idea that
17 -- the impression -- maybe you all can help me
18 on the Comcast side -- that Versus was not --
19 was majority owned anyway by Comcast, if not
20 100 percent.

21 MR. TOSCANO: In 2009, it was
22 wholly owned by Comcast.

1 JUDGE SIPPEL: Okay. Well, okay,
2 I guess I've taken enough of your time. Go to
3 it.

4 MR. SCHMIDT: Absolutely, Your
5 Honor.

6 BY MR. SCHMIDT:

7 Q Let's finish up with Exhibit 40,
8 page 10. Just so I understand it, this is a
9 Comcast document, correct?

10 JUDGE SIPPEL: This is called
11 Tennis Channel Exhibit 40?

12 THE WITNESS: Yes. This is a
13 Comcast programming document on cable, but
14 Versus is -- it seems to be from Versus.

15 BY MR. SCHMIDT:

16 Q Yes, it's a Versus document.
17 Versus is owned by Comcast, right?

18 A Yes.

19 Q And it's Versus talking about
20 Tennis Channel and Versus saying, "Tennis
21 Channel has distribution issues," correct?

22 A It's Versus talking about Tennis

1 Channel saying they have distribution issues,
2 correct.

3 Q Okay. And you just don't know
4 whether you agree with that or not.

5 A Correct.

6 Q Okay. But you do agree that
7 distribution can pose a problem for a network
8 in securing valuable content, correct?

9 A I really don't know.

10 Q You don't know.

11 A I know that -- you know, that
12 that's the claim in this proceeding. I've
13 seen reference to it. I haven't studied it.
14 I don't know.

15 Q Did you read Mr. Solomon's
16 testimony?

17 A His written testimony, I did, yes.

18 Q Did you see him talk about how
19 Tennis Channel has been unable to secure
20 certain programming rights or has had
21 limitations placed on its ability to secure
22 certain programming rights because of limited

1 distribution?

2 A I did see that, yes.

3 Q Including the French Open
4 programming rights, some of the most valuable
5 tennis programming rights there are, correct?

6 A I don't specifically remember that
7 one, but I'm not going to disagree with you on
8 that.

9 Q Do you have any reason to disagree
10 with Mr. Solomon on those factual statements
11 that Tennis Channel has faced challenges in
12 its ability to secure programming rights
13 because of its distribution?

14 A I have no reason to doubt what he
15 says.

16 Q Let me just very quickly show you
17 a document that speaks to this issue.

18 May I approach, Your Honor?

19 JUDGE SIPPEL: Please do.

20 MR. SCHMIDT: This is in evidence.
21 It's Tennis Channel Exhibit 178. And this is
22 pretty confidential, but I don't think there

1 is any -- well, actually, I'm sorry, I'm going
2 to have to ask the --

3 JUDGE SIPPEL: Do we have to
4 excuse --

5 MR. SCHMIDT: -- Comcast gentleman
6 to leave. I apologize. Do you mind just
7 stepping out for a minute?

8 JUDGE SIPPEL: That was --

9 MR. SCHMIDT: Oh, you have? I'm
10 sorry. Then, I apologize. I apologize.

11 JUDGE SIPPEL: Whoever isn't on --
12 yes, whoever isn't on the -- this is the
13 gentleman in the back.

14 MR. SCHMIDT: Yes, this is our
15 document, so --

16 JUDGE SIPPEL: It's okay for me to
17 stay, isn't it?

18 (Laughter.)

19 THE WITNESS: Can I leave?

20 (Laughter.)

21 BY MR. SCHMIDT:

22 Q This is a licensing agreement.

1 I'm not going to ask you much about it, so
2 please look at it as much as you want, but
3 I'll be pretty quick with it.

4 A Okay. Okay. Why don't we -- it's
5 long, so --

6 Q Yes.

7 A -- jump right into it.

8 Q Okay. So we know from the first
9 page that this is a licensing agreement
10 between the U.S. Open and -- I'm sorry, it's
11 a licensing agreement between the U.S. Tennis
12 Association, the U.S. Open series, and The
13 Tennis Channel. Do you see that there in the
14 first paragraph?

15 A I do.

16 Q And it's so that Tennis Channel
17 can carry U.S. Open series tournaments, do you
18 see that in that second whereas clause?

19 A Yes.

20 Q Okay. The part I want to ask you
21 about is at the bottom of page 5.

22 A Okay. All right.

1 Q And if you look at the bottom of
2 page 5, there is language that -- I'm going to
3 paraphrase it a little bit, and tell me if I
4 paraphrase it right -- that if Tennis Channel
5 reaches distribution of [REDACTED] households,
6 then it will qualify for consideration of
7 additional programming rights that it doesn't
8 presently enjoy. Does that seem like a fair
9 construction of that paragraph?

10 A Yes, it does.

11 JUDGE SIPPEL: Where are you
12 seeing that? In which paragraph? In the
13 first?

14 MR. SCHMIDT: The very last one.

15 JUDGE SIPPEL: Oh, okay.

16 MR. SCHMIDT: "If and at such time
17 as" --

18 JUDGE SIPPEL: I've got you.

19 MR. SCHMIDT: Yes. "TC has a
20 reach of [REDACTED] households."

21 BY MR. SCHMIDT:

22 Q Is that uncommon, that content

1 providers will only provide content or
2 valuable content to networks when they reach
3 certain thresholds for viewership?

4 A Again, as I said earlier, I don't
5 have experience with that. I really can't
6 say.

7 Q Okay. You're not able to say one
8 way or the other how much more content Tennis
9 Channel could secure if it had broader
10 distribution?

11 A I'm not.

12 Q Okay. But would you agree with me
13 that -- I think you alluded to this in one of
14 your answers a few minutes ago -- that
15 probably the single biggest thing that Tennis
16 Channel could do to improve itself as a
17 channel would be to secure valuable
18 programming like the programming discussed in
19 Exhibit 178.

20 A Let me say it differently. I
21 think if Tennis Channel could secure, you
22 know, later round matches for any of the grand

1 slam events, it would help them leverage
2 distribution partners, cable and satellite,
3 for greater distribution.

4 Now, is it the single most
5 important thing they could do? I don't know
6 the answer to that, because they could do
7 other things as well that may be more
8 important. But would it be significant? Yes.

9 Q Okay. So let me see if I have
10 your answer. Would it be a significant -- if
11 The Tennis Channel really wanted to go out and
12 improve itself, would one significant step it
13 could take be to secure more valuable
14 programming rights like the programming
15 discussed in that paragraph we were looking at
16 in Exhibit 178?

17 A Yes, I believe so.

18 Q Okay. And do you have any reason
19 to disagree with the suggestion that Tennis
20 Channel has been impaired in its ability to
21 get that programming because of its
22 distribution level?

1 A Again, I will stop agreeing with
2 you there, and simply say I don't know. And
3 I have seen other examples where distributors
4 have -- oh, distributors -- licensors have
5 licensed sports programming to entities with
6 lesser or no subscribers. And so it's not a
7 stop sign.

8 Q I don't want to put you on the
9 spot with this question, but could you tell us
10 how many years of experience you have had in
11 the cable business?

12 A I have been in the cable business
13 since 1978.

14 Q Okay. So about 33 years, okay.

15 A I was 12 when I started.

16 (Laughter)

17 Q So stipulated. Have you ever had,
18 in your experience in the cable industry, a
19 network come to you and say -- and demand a
20 certain level of carriage from you, so that
21 they could meet obligations to their content
22 providers to deliver a certain level of

1 carriage? Do you follow my question?

2 A I have not had anybody -- any
3 programmer say that to me. I have had them
4 come to me and demand carriage levels, but I
5 have not had them say "because I have to meet
6 a benchmark."

7 Q Would that be pretty unusual?

8 A It would certainly be unusual to
9 me, since I have never had it said to me.

10 Q Let me show you just a couple more
11 of these documents on Versus and Tennis.

12 May I approach, Your Honor?

13 JUDGE SIPPEL: Please do, yes.

14 BY MR. SCHMIDT:

15 Q Tennis Channel Exhibit 41 is in
16 evidence, and I'll tell you, Mr. Egan, that
17 this is another one of these slide decks. It
18 contains some --

19 JUDGE SIPPEL: Thank you.

20 MR. SCHMIDT: You're welcome, Your
21 Honor.

22 BY MR. SCHMIDT:

1 Q It contains some, but not all, of
2 the same language as the one we were just
3 looking at, Exhibit 40. So I'm just going to
4 focus on this, and hopefully go through it
5 very quickly.

6 And the first question I'm going
7 to ask you about -- well, tell me when you
8 have had a second to look at it.

9 A Okay. Shoot.

10 Q Exhibit 41 is another one of these
11 Versus documents looking at whether they
12 should try to secure U.S. Open rights,
13 correct?

14 A Yes.

15 Q Have you seen this one before?

16 A I have not.

17 JUDGE SIPPEL: Is this -- are the
18 dates important? This is July 2007. I'm not
19 sure if the date is that significant, but --

20 MR. SCHMIDT: It's about a week
21 after Exhibit 40, I believe. Yes, exactly one
22 week after Exhibit 40.

1 JUDGE SIPPEL: Yes.

2 BY MR. SCHMIDT:

3 Q What I would like to direct your
4 attention to is page 8 of this document titled
5 U.S. Open Opportunity. And it comments on the
6 U.S. Open being the only premier event in the
7 sports landscape until 2013. Do you see that?

8 A I do.

9 Q Do you agree with Versus that the
10 U.S. Open is a premier event?

11 A I do.

12 Q It then discusses some of the
13 language we have looked at before, so I'm
14 going to skip over that. The second bullet
15 under there says, "Helps to continue branding
16 the network as a must-watch station for sports
17 fans." Do you see that?

18 A I do.

19 Q Do you agree with Versus that the
20 U.S. Open would help continue branding the
21 network as a must-watch station for sports
22 fans?

1 A I think it's an inflated
2 statement. I would say that it is a tent pole
3 event that has significant value if the
4 matches are the later round matches that are,
5 you know, most -- highest profiled. So I
6 think his statement or her statement here, you
7 know, may go a little beyond the panel.

8 Q You would disagree with it on
9 emphasis?

10 A I would, yes.

11 Q Okay. They state at the end of
12 this in this bold-faced language, "Provides a
13 distribution hedge against Versus' failure to
14 renew NHL." Do you see that?

15 A I do.

16 Q Were you aware that Comcast or
17 Versus was looking at securing tennis content
18 so that it could serve against a hedge in the
19 event -- a distribution hedge in the event
20 Versus failed to renew the NHL?

21 A Again, my --

22 Q My question is just, were you

1 aware of that?

2 A Yes. Again, my role here was to
3 look at the actions of Comcast Cable in
4 relation to how they treated Tennis Channel
5 and to address Mr. Brooks' arguments of
6 substantial similarity in programming and
7 audience. So I didn't look at what Versus'
8 programming network was presenting internally.

9 Q Okay. So was that something you
10 were not aware of?

11 A I was not aware.

12 Q Let's jump ahead to page 18.

13 JUDGE SIPPEL: What is a "tent
14 pole event"?

15 THE WITNESS: A tent pole event is
16 a name -- you might hear marquis programming
17 event.

18 JUDGE SIPPEL: If you had said
19 "marquis," I would have known. But I never
20 heard "tent pole event."

21 THE WITNESS: Very similar
22 meaning, as I understand it. I think it comes

1 from --

2 JUDGE SIPPEL: Circus?

3 THE WITNESS: -- as was explained
4 to me a little earlier, is that it's a tent
5 pole to hold up the tent. And so, you know,
6 we can -- if we get this tent pole event, we
7 can put other things under it, under -- in our
8 tent.

9 MR. SCHMIDT: Believe it or not,
10 Your Honor, I looked it up last night on the
11 internet, and the only answer I found was a
12 Wikipedia entry. And it said exactly that,
13 it's from the circus.

14 JUDGE SIPPEL: Well, you are going
15 to be in charge of the glossary.

16 (Laughter.)

17 I'm so glad that --

18 MR. SCHMIDT: I will define "tent
19 pole event" in the glossary.

20 JUDGE SIPPEL: -- you took the
21 trouble to look it up. But that does make a
22 lot of sense. Thank you.